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Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

C. G. BISHOP, ADMINISTRATOR OF THE ESTATE OF ARTHUR LEE BAKER, JR., DECEASED, PETITIONER,

versus

S. HENDRICKS, JR., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on May 16, 1974.

OPINIONS BELOW

The opinion of the District Court is printed in Appendix A hereto. The opinion of the Circuit Court of Appeals is reported in 495 F. (2d) 289 and is printed in Appendix B hereto. Petitioner's Petition to the Court of Appeals for Rehearing is printed in Appendix C hereto.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254.

QUESTIONS PRESENTED

Should this Court issue a writ of certiorari to review the judgment of a Court below where its decision and opinion:

(a) creates a conflict with the decisions of the Courts of other Circuits; and

(b) legislates an amendment to an existing statute, properly within the province of Congress, or promulgates a new rule to govern an area of jurisdiction, properly within the province of this Court.

STATUTES

This petition involves the provisions of 28 U. S. C. 1359.

STATEMENT

Arthur Lee Baker, Jr., his brother, Charles Frederick Baker, and his brother's wife, Virginia Baker, were all killed when the car in which they were riding on Interstate 26 in South Carolina was struck in the rear by a tractor-trailer truck driven by an agent of the Defendant-Respondent S. Hendricks, Jr.

C. G. Bishop, the Administrator of the estates of all three of the deceased instituted suit on behalf of the estate of A. L. Baker, Jr., in the United States District Court for the District of South Carolina. Bishop, the uncle of all three of the deceased is a resident of Georgia; the Defendant-Respondent Hendricks is a resident of South Carolina as are the beneficiaries of the estate involved.

The Defendant-Respondent Hendricks moved to dismiss the suit against it contending that the administrator C. G. Bishop was improperly or collusively made a party Plaintiff so as to invoke diversity jurisdiction of the Federal Courts in contravention of 28 U. S. C., Sec. 1359.

The District Court after conducting an evidentiary hearing found as a fact that the selection of Bishop was

not made so as to manufacture diversity.[1] The District Court Judge nevertheless granted the motion to dismiss deeming his action responsive to certain language of the Fourth Circuit Court in *Miller v. Perry,* 456 F. (2d) 63, to wit:

> "Until enactment of the statute recommended by the Institute, an event much to be hoped, however, we deem ourselves limited to the less satisfactory resolution of the problem we now reach: To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative."

But the circumstances and issues brought about by a particular state statute in *Miller* were so especial to that one case and irrelevant to the pivotal issue as it arose in the instant case that petitioner took the position in the District Court that the Fourth Circuit Court's decision in *Miller* must almost necessarily have been intended to apply to *Miller* only.

Petitioner took the same position in his appeal to the Fourth Circuit Court. The Fourth Circuit Court, addressing itself to petitioner's position, formally ratified the scope of its act in *Miller* by declaring:

> "The Appellant would confine the scope of *Miller* to the peculiar facts of that case; and since the facts in this case are different, he argues *Miller,* is without application. *Miller,* however, was not phrased in the narrow terms of its own facts. The language of *Miller* was manifestly intended as a declaration of what one commentator has correctly denominated as **'a substantial change in diversity jurisdiction.'** " [Emphasis supplied.] *Bishop v. Hendricks.*

[1] The evidence of record in support of the finding of the Court was clear and abundant; and no appeal from the District Court's finding was taken by Defendant-Respondent.

The focal point of this petition for a writ of certiorari is the Fourth Circuit Court's making a substantial change in diversity citizenship on its own to the extent of legislating a new statute or promulgating a new rule in the important area of jurisdiction, properly for Congress or this Court.

REASONS FOR GRANTING THE WRIT

1. The Lower Court by its Decision in this Case, Ratifying its Decision in *Miller v. Perry,*[2] has created a conflict between the decisions of Federal Appellate Courts, Which Conflict is Properly for this Court to Resolve.

In handing down its decision in petitioner's case the Fourth Circuit Court firmly announced that its decision and opinion in *Miller v. Perry, supra,* "was manifestly intended as a declaration" of **a substantial change in diversity jurisdiction.**

When the Fourth Circuit Court ordered what was intended to create a substantial change in diversity jurisdiction, as it did and said it intended to do, the Fourth Circuit Court not only usurped the function of another branch of government and went beyond the boundaries of its place in the federal judiciary system, particularly with respect to its subordinate relationship to this Court in rule-making, the Fourth Circuit Court also brought about a conflict between the decisions of Federal Appellate Courts, which conflict is properly for this Court to resolve

Since *Kramer v. Carribean Mills,* 394 U. S. 832 (1969) the Courts of all Circuits, except now the Fourth Circuit Court, have applied the test of whether or not the motivation behind the appointment of an administrator in a death action was for the sole purpose of manufacturing diversity jurisdiction in contravention of the mandate of 28 U. S. C. 1359. This test, logically called for by the express terms of the statute, the prevailing test in all other Circuits, is

[2] *Miller v. Perry,* 456 F. (2d) 63 (4 Cir. 1972).

totally opposed and repudiated by the Fourth Circuit Court's test made "to hinge the diversity determination to the citizenship of the wrongful death action beneficiaries" regardless of the validity of the party's appointment otherwise, as in petitioner's case.

This obvious conflict that now exists between the Circuits in determining the issue of diversity jurisdiction within the mandate of 28 U. S. C. 1359, is a critical conflict in an important area of jurisdiction that needs to be resolved by this Court.

2. The Lower Court Has So Completely Exceeded its Judicial Authority and Function as to Require This Court to Exercise its Power of Supervision to Correct Such Excess.

The "substantial change in diversity jurisdiction" that the Fourth Circuit Court has declared in petitioner's case amounts to ordering an amendment of an existing statute, a function within the province of Congress, if not an act of rule-making, properly for this Court.

Petitioner respectfully submits that the substantial change in diversity jurisdiction thus effected has been improperly wrought into existence to begin with; and, moreover, if allowed to stand, is just the sort of thing that leads to the erosion of due process in this Government.

Manifestly, this is a case calling upon this Court for the exercise of its historic, inherent, and quite necessary power of supervision to maintain reasonable and fair uniformity in the administration of justice between the respective Circuit Courts of the federal judiciary.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari, it is respectfully urged, should be granted.

Respectfully submitted,

/s/ WILLIAM T. JONES,
Counsel for Petitioner.

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C/A No. 72-1538

TRANSCRIPT OF HEARING ON MOTION TO DISMISS

The above matter came on to be heard in the Hearing Room in the United States Court House at Columbia, South Carolina, on the 17th day of April, 1973,

Before: Honorable Sol Blatt, Jr., United States District Judge.

Appearances: William T. Jones, Esq., for Plaintiff;
James H. Watson, Esq., and Carl G. Ferguson, Esq., for Defendant Hendricks.

The COURT: Gentlemen, this particular file covers a matter that was very dear to my heart as a lawyer, and it is one that I am very much interested in.

I will be honest, when I first saw the motion, I thought it would be really simple in view of the *Miller* case, but as I have read the *Miller* case and studied it, it is not quite as simple as I thought it might be.

I have been over it once. Tell me who Hendricks is. Was he the driver of the truck? Give me a little more information about the facts.

Mr. WATSON: Mr. Hendricks is the employer of a man who is not identified as a party defendant, but who was the actual driver of the Hendricks tractor-trailer rig involved in the accident. Fruehauf Corporation is not represented by us, but by some other law firm.

Is that correct?

Mr. JONES: Yes.

Mr. WATSON: They are not involved in the present motion. Mr. Hendricks had leased a trailer from Freuhauf.

The COURT: Freuhauf is not moving?

Mr. WATSON: There was some confusion about coverage.

The COURT: Let me go back and take a look at the complaint.

Mr. WATSON: I will find out for you.

Mr. MOTLEY (Law Clerk): Freuhauf is out of the State.

Mr. FERGUSON: Right.

Mr. MOTLEY: So you would still have diversity.

The COURT: Hendricks operated the trailer that was owned by Freuhauf. Hendricks had leased a trailer from Freuhauf, and Hendricks was driving his own tractor?

Mr. WATSON: No, sir, he was not involved in the accident. He owned the tractor.

The COURT: Hendricks' tractor was being driven by somebody who is not a party?

Mr. WATSON: Yes, sir.

The COURT: Who was pulling a trailer owned by Freuhauf.

Mr. WATSON: Yes, sir.

The COURT: Was the operator involved doing something for Hendricks or for Freuhauf?

Mr. WATSON: He was on Hendricks' business.

The COURT: Freuhauf had nothing to do with it?

Mr. WATSON: Freuhauf had nothing to do with it.

The COURT: Has Freuhauf made any motion? What is Freuhauf's position?

Mr. JONES: They have appeared at the depositions. Mr. Bradford of Greenwood as representing Freuhauf presented himself and interrogated the three witnesses that were deposed.

The COURT: Of course that is no concern of mine.

You are moving only to dismiss Hendricks as a party?

Mr. FERGUSON: Yes, sir.

The COURT: You are not moving to remand?

Mr. WATSON: We are moving to dismiss the action from the federal court.

Mr. FERGUSON: Originally we represented Freuhauf—Mr. Johnson in our firm. He filed an answer in behalf of Freuhauf. Then somewhere along the line, as a policy matter, they concluded that there may be a conflict of interest at the trial if we represented both of the defendants, and Mr. Johnson transferred the case over to Mr. Howard Burns' firm, and he represents Freuhauf.

The COURT: What I am concerned about—I haven't been into this angle of it, because it just never occurred to me that you are moving to dismiss an action and Freuhauf hasn't joined in your motion.

Mr. WATSON: Right. If the plaintiff were a resident of South Carolina and if Freuhauf were not, you would get jurisdiction there.

The COURT: Where you have two defendants, can one defendant move to dismiss as to both defendants?

Mr. FERGUSON: We are trying to do it.

Mr. WATSON: We would be glad for you just to dismiss us and proceed on.

The COURT: You have got two defendants represented by different counsel.

Mr. WATSON: Yes, sir.

The COURT: And you are moving to dismiss as to both of them. For all I know, Freuhauf might oppose that motion.

Mr. WATSON: Maybe so, but as long as we are in the case, the federal court has no jurisdiction. There is no diversity. Once we get out, that would solve the problem.

The COURT: There would be diversity certainly if Freuhauf is a party and you are not.

Mr. WATSON: Right, sir.

The COURT: I don't know where Freuhauf is incorporated, but I doubt if it is incorporated in Georgia.

Mr. WATSON: No, sir.

Mr. JONES: Michigan.

The COURT: I might let Hendricks out, but I don't have the right under your motion—you can't move to dismiss an action against somebody else.

Mr. FERGUSON: That is correct.

Mr. WATSON: Regardless of whoever might be moving or who might not be moving.

The COURT: I am kind of concerned as to whether your proper motion should be to remand or to dismiss.

Mr. WATSON: It can't be to remand, because it was initially brought in the federal court.

Mr. FERGUSON: I said the same thing.

The COURT: That is right. It hasn't been removed.

If your position is right, the court wouldn't have jurisdiction, unless there is complete diversity. I think you are probably correct. Any party can contest the jurisdiction at any time.

Mr. JONES: They always told me to keep quiet as long as you had the Judge trying to help you.

The COURT: All right. Now to go back, Baker was riding in the car; the tractor was owned by Hendricks, and he was pulling a trailer owned by Freuhauf. And Baker was killed in the wreck.

Mr. JONES: And also Baker's brother and his brother's wife.

Mr. WATSON: All three of them were killed.

The COURT: And Baker was a resident of South Carolina.

Mr. JONES: Baker was a resident of Laurens County.

The COURT: We were talking about the survivors being the mother and father and the brothers. The brothers wouldn't participate.

Mr. JONES: I was in error there. It would be only the mother and father.

The COURT: He has got one, two—three living brothers, and one brother was killed in this wreck.

Mr. FERGUSON: Yes, sir.

Mr. JONES: And his brother's wife.

The COURT: Now I have got the background.

All right, I will be glad to hear from you. And the Administrator, Mr. Bishop, is the brother-in-law of Mr. Baker or Mrs. Baker.

Mr. FERGUSON: Mrs. Baker.

Mr. JONES: He is the brother-in-law to both of them. He married the sister of Mrs. Baker.

The COURT: You mean, he is Mrs. Baker's brother-in-law.

Mr. JONES: Yes, sir.

The COURT: He married Mrs. Baker's sister.

Mr. JONES: Yes, sir.

The COURT: He would be this boy's uncle.

Mr. JONES: Yes, sir.

The COURT: He lives over in Georgia somewhere?

Mr. JONES: Yes, sir; not far over there.

The COURT: But he does live across the state line?

Mr. JONES: Yes, sir.

The COURT: There is no question about his residency. He lives in Clarksville, Georgia.

Now, go ahead, Carl.

Mr. FERGUSON: Our position is more or less exactly what is stated in the brief. We think under the depositions, the defendant Hendricks should be dismissed because the administrator Bishop was improperly made a party-plaintiff so as to invoke the jurisdiction of the court. We take the position that the *Miller* case lays down the rule in any action which is contested under 28 U. S. C. A. 1359. We rely on the *Miller* and the *Lester* cases.

The COURT: In the *Lester* case, there wasn't any question but that they had an out-of-state administrator appointed to get into the federal court. That was the sole motive, and Judge Haynsworth wrote the opinion and said you couldn't do that any more. It was contended in that case that the administrator, an attorney of Augusta, Georgia, was appointed solely for the purpose of invoking the jurisdiction of the district court.

Mr. FERGUSON: We take the position that that motivation in and of itself is not sufficient.

The COURT: Well that is what I thought. And the Fourth Circuit got ready to say that, and they quote with approval the A. L. I. proposal to restrict the citizenship to any persons—it is the mother and father in this particular case—who were the sole beneficiaries under the statute. It says you would restrict the citizenship to the beneficiaries who were entitled to bring an action for his wrongful death. I gather from that proposal that if you got killed and left four children and they were residents of four different states, you could have any of the four appoint administrators and their citizenship would be the controlling factor.

Mr. FERGUSON: I don't have the case before me, but as I remember, the citizenship of the decedent would be the place to have the administrator appointed, whoever that may be, whether it be one of his children or not.

The COURT: It would be the citizenship of the decedent, and it would be by any representative authorized to bring the action.

Mr. FERGUSON: Right.

The COURT: You are right about that. If you had one child in four different states, it would be the citizenship of the decedent that would govern, whoever brought the suit. That is how I read it in the beginning.

Mr. FERGUSON: Right.

The COURT: And that is the one that should be adopted.

Mr. FERGUSON: Yes, sir. And I think that in their opinion, it would take congressional action to adopt such.

The COURT: And they go on to limit the citizenship to the wrongful death beneficiaries.

Mr. FERGUSON: Which is what we contend is the present state of the art now.

The COURT: Now, Bill, if you go by what the Fourth Circuit has said, all of this wasn't necessary. That is what they said they would prefer. You tell me why I shouldn't follow that.

Mr. JONES: Well, in the first place, Judge, the position of the plaintiff in this case is that there is diversity of citizenship, and I was happy to read the Judge's remarks concerning the equity of a case, because I think he is quite concerned about it from that standpoint.

The facts in the *McFaddon* case are different, and I don't take it that the *Miller v. Perry* case particularizes the thinking of the court, as you point out. This is all dictum. They are referring to a case where they have a special statute which requires that an administrator be a resident of that state.

Now when they talk about preferring the proposal of the American Law Institute's method of determining citizenship—

The COURT: They indicate that you ought to have a statute.

Mr. JONES: Then in *Kramer*—

The COURT: I see you have got something photostated.

Mr. JONES: *McFaddon* and *Perry*.

The COURT: Get to the last sentence really.

Mr. JONES: In *Perry*?

The COURT: "Until enactment—" Do you see what I am referring to? Just four or five lines before the end, on Page 68.

Mr. JONES: "The problem we reach—"

The COURT: Right above that.

Mr. JONES: "Until enactment of the statute recommended by the Institute, an event much to be hoped, however, we deem ourselves limited to the less satisfactory resolution of the problem we now reach: To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative."

In the *Lester v. McFaddon* case, they tried it in the state court and lost. The lawyers for the child and the mother's statutory beneficiaries then procured the appointment of an out-of-state administrator.

The COURT: What are you reading from?

Mr. JONES: *Lester v. McFaddon*, Page 1105, in the first column, commencing with the last paragraph in that column. "These differences, of course, are obvious, but the fact that the beneficiaries of the action may not proceed in their own name, hardly amounts to a distinction when they or their legal advisers procure the appointment of an out-of-state administrator who had no former connections with the decedent solely for the purpose of creating diversity of citizenship."

To get into motivation, there are cases that we would like to refer to, as set out in our memorandum. This administrator is somebody who is close to the family.

The COURT: Let me ask you, if you are fixing to go into motivation: What is the status of the other three children? Are they grown children, the surviving children?

Mr. FERGUSON: Yes, sir.

Mr. JONES: Judge, you will notice in the three depositions that this family is destitute. They are very down-and-out people. The sole survivor of one of the Bakers, and his wife, who is a minor, can't read or write. That is the sole survivor of those two who were killed.

The COURT: That is, the mother and father?

Mr. JONES: They were killed in the accident, yes, sir.

The COURT: They were Baker's brother and sister-in-law?

Mr. JONES: Right. The sole survivors of the unmarried one are his mother and father, with whom he lived, who are very old, and who looked to his comfort and help about the house. They have been very shaken up.

The COURT: Where are the other three brothers?

Mr. JONES: Well they may be in the pen, and I am speaking very honestly. All of them are not so bad, but to this extent: They drink and drive, and I have prosecuted them. They are in and out of court. And frankly, the deceased was in court with me just before he got killed. I tried to get him to go back to school. He couldn't read or write. He was a big, grown boy.

The COURT: I can understand that. I would have to go into the reasons, which apparently are in the depositions, why this fellow was appointed. I just read generally and hastily that he was appointed because he is a man of some means, of some prominence, who has an education, who can handle the matter and advise with them. Basically that is your contention.

Mr. JONES: Yes, sir.

The COURT: He is their superior in intelligence and expertise.

Mr. JONES: He is the one in this whole family who can do it, and the only one in which they have confidence.

The COURT: The Fourth Circuit by way of dictum has eliminated motivation until the enactment of the statute that is recommended by the Institute. Apparently it takes some statutory enactment. They say "Until enactment of the statute recommended by the Institute, an event much to be hoped, however, we deem ourselves limited to the less satisfactory resolution of the problem we now reach: To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative."

Mr. JONES: I feel that that language means only that the door swings on it and they are not closing the door to factors that should be brought into play.

The COURT: "To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative." Now the thing that concerns me: Why do they need a statute?

Mr. FERGUSON: I don't know. That is a good question.

The COURT: If they can hinge it on the citizenship of the beneficiaries, why can't they hinge it on the citizenship of the decedent?

Mr. FERGUSON: I agree. Anything I say is just a guess. It may be that they threw that out in *Lester*. I don't know why. At least it was dictum in that case, and they didn't want to back off on it in *Miller v. Perry*. They may have a good reason why they couldn't do it. That is a good question.

The COURT: You have developed the motivation of the plaintiffs, the motivation of the beneficiaries in appointing this fellow?

Mr. JONES: Yes, sir, as far as it could be. Judge, there could be additional information, additional testimony brought to Your Honor's attention in an evidentiary hearing from this beneficiary of two of the decedents, that is, Baker and his wife, who was Baker's brother and sister-in-law. We take opposite positions on that. He says that is not in litigation, and we take the position that this whole thing should be viewed simultaneously. He knows it is coming. I want to fly above board. I, myself, have turned to outside administrators solely for the purpose of jurisdiction. In this case when they came to get me, they would come in and go out, and it was a rather tenuous thing. I wanted them to decide. They were rather concerned as to who it was going to be. They had been and talked to two different Probate Judges, and the Probate Judges told them somebody had to be appointed, and they had quite a battle among themselves as to who it would be. When they came to talk with me, I said "You will have to make that decision." And they made the decision. And I don't think that the Fourth Circuit intended that these people cannot have this man as their administrator.

The COURT: Oh, they can have him.

Mr. JONES: Yes, sir. I believe that there can be a showing on the motives on which they got him. They got him for the reason that he is the only member of that family who has enough intelligence to act in such capacity. And he has been close to those two old people for a long time. He has helped them and done a lot for them. I didn't adequately ask questions relating to how much he had been with them and how often, since this took place, particularly to give them comfort and support at the time their two sons and daughter-in-law got killed,—particularly the one son who lived with them.

The COURT: There is one question that I notice you take in this brief, and that is that counsel in conducting the discovery went into issues entirely—

Mr. JONES: Relative to liability and damages.

The COURT: And they didn't limit themselves to jurisdictional matters.

Mr. JONES: And there is a case on point with that, Judge.

The COURT: First of all, let me find out: Does the defendant take issue with that?

Mr. FERGUSON: No, sir, but we would have to hear the case first.

The COURT: You know he says—and I just got this myself—I don't know if you can waive—

Bill, do you take the position that you can waive jurisdiction in a matter like this?

Mr. JONES: In a matter like this, Judge?

The COURT: You know, there is one thing that confuses me: You have got to keep it straight. You can waive the right to remand if you are in the State Court and they bring you in the federal court, and if you take any action in the federal court other than to try to get out, you waive it.

Mr. JONES: I think this is very analogous to the right to remand.

The COURT: But you are not waiving jurisdiction. Can you waive jurisdiction if the federal court never had jurisdiction? Can you give them jurisdiction?

Mr. JONES: Well, I feel this way, Judge: There are two cases—one is *McSparran v. Weist,* a case out of the federal court—

The COURT: I am talking about the other action. Assumming you were not properly in the federal court, can they waive the issue of the federal court's jurisdiction by doing anything? If this court didn't have jurisdiction when you brought it, because there was not complete diversity—

Get me Rule 12.

Mr. WATSON: While he is looking for that, am I wrong in my recollection that if a case is being tried, and the Judge concluded that $10,000.00 could not possibly be involved, and hence he dismissed it at that juncture?

The COURT: Yes, sir.

Mr. WATSON: They were in trial and seemingly waived jurisdiction.

The COURT: Yes, I believe that is true. Sometimes you sue two defendants. Of course, this is venue and not jurisdiction. If you sue a resident of Greenwood County and a resident of Greenville County, you bring it in Greenwood County, and if you got a directed verdict or a nonsuit with prejudice as to the Greenwood County defendant, could they then move to change the venue to Greenville?

Mr. WATSON: You can do it in the State Court.

The COURT: Can you do that in the State Court?

Mr. WATSON: Yes, sir.

Mr. JONES: I don't think you could if you have answered and not raised the point.

Mr. WATSON: Yes, sir. I have done it.

The COURT: Did you raise the point in your answer?

Mr. WATSON: No, sir, as long as the defendant that gave the court the proper venue—once that defendant gets out by way of a verdict or what-have-you, that destroys the venue, you can waive certain types of personal jurisdiction —waive that by a personal appearance.

The COURT: This is for lack of jurisdiction over the person.

Mr. WATSON: Lack of jurisdiction over the subject matter.

Mr. FERGUSON: Judge Blatt, if I may interject: In the *Lester* case, the court on its own volition took great pains to indicate that although this was an improperly invoked jurisdiction—they took great pains to point out that the equities lie in favor of the appointment.

The COURT: Listen: I know the answer to that. I got up in the Court of Appeals myself arguing in a case in which we had gotten an out-of-state administrator who was appointed solely for the purpose of creating federal jurisdiction, and one of these judges inquired about it, and we lost the case in the federal district court, and we would have been glad to get even a new trial on any basis. I know about the *Lester v. McFaddon* case. But *Lester v. McFaddon* came out after we brought the case. Before we tried it, it was mentioned—we had just gone so far—and Judge Martin said to go ahead and try the case. They gave serious consideration to dismissing it for want of jurisdiction. Of course, I switched. This was in the middle of the *Lester* case. This case was pending. They said since we had gone this far, they wouldn't dismiss it. Otherwise they would have dismissed it for lack of jurisdiction, or directed the district court to dismiss the action. But they wouldn't do that. It does indicate that the question of jurisdiction could be raised at any time. I don't think they would have waived their right.

Have you got a case that waived their right?

Mr. JONES: *Guglielmo, Administrator, v. Scotti & Sons, Inc.*, 311 F. Supplement.

The COURT: Have you got that in this paper?

Mr. JONES: Yes, sir.

The COURT: At what page?

Mr. JONES: Page 6. While we are on Page 6—counsel has a copy—I would like to cite *Groh v. Brooks,* wherein the Court said:

> "In determining whether or not diversity has been artifically created, the district court may consider, *inter alia,* such factors as the identity of the representative and his relationship to the party represented; the scope of the representative's powers and duties; any special capacity or experience the representative

may possess with respect to the purpose of his appointment."

The COURT: What circuit is that from?

Mr. JONES: From what little I was able to determine, the circuits differ on the burden of proof. One circuit holds that the burden of proof is on the plaintiff, and one circuit holds on the other hand that the person bringing up the question has the burden of proof. As Your Honor knows, if there is a difference in circuits, the Supreme Court has to straighten that out.

But moving on, there is a recent A. L. R. Annotation on diversity of citizenship, which says:

> "Although commenting that it appeared that the acquisition of federal jurisdiction was an incidental purpose or motivation for the appointment in the present case, the court concluded that the guardian was appointed primarily because under the circumstances he could best carry out the duties imposed upon the guardian."

In *Guglielmo v. Scotti,* Page 7, the court said:

> "It is clear that he was chosen as administrator because of the warm and close relationship which he had with decedent's immediate family and because of the understanding and emotional support he could bring to the survivors of the immediate family during difficult times."

And the Court further set forth, as the basis for denial of defendant's motion, the fact that discovery had progressed in that court.

I realize you don't like that. Excuse me.

The COURT: The Fourth Circuit didn't dismiss our case and Judge Martin didn't dismiss our case because we had gotten pretty far into it before *Lester v. McFaddon* came down. Here we were, getting ready for trial. In fact, I believe we had tried our case in the fall, and *Lester v. McFaddon* might have come down in September. Yes, September 15th. I thought that was the date. We were up here in October ready for trial, and the Judge just didn't feel it

would be fair to create an undue hardship on us and throw us out then.

Mr. JONES: Judge, to summarize the position of plaintiff, we feel that a factual determination is left to the Court, and the only way a factual determination can be made, assuming the burden of proof is on the plaintiff, but as I say, there is a diversity of opinions within the circuits, —I think counsel will agree with me on that,—as to who has the burden of proof.

The COURT: You have got to get me over one hurdle. I would go into that, and from what you tell me, without having studied the depositions in detail, and apparently the defendant doesn't disagree with what you say, this might be the very case in which this person should be appointed and who would be the proper person. There is no question about that. If I could get around the words "Until enactment of the statute recommended by the Institute, an event much to be hoped, however, we deem ourselves limited to the less satisfactory resolution of the problem we now reach: To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative."

I remember when this case came out. I had been on the bench not too long. It was in February 1972. One of the last cases I handled, one of the last things I did, Judge Russell wrote that opinion, in *Carter v. Seaboard,* which prohibited the assignment. I thought it was one of the best things I ever wrote, and I got him not to throw mine out until I could take a deposition and determine if there had been a proper assignment, whether he was going to participate in the case and whether he was really going to get his one hundredth part, whether he had a lawyer, and whether he was going to control or whether he was just a name that I picked out down in Florida. Well, from a practical standpoint, this was just a name. And although he gave me the right to pursue it, I figured if I was going to pursue one, this wasn't the one to pursue, and I decided not to oppose the motion to remand. Motivation really wasn't an issue.

Mr. JONES: It wasn't impugned at least.

The COURT: But I felt you would never get by the Fourth Circuit with such an assignment. I thought that when *Miller* came out, we had seen the last of the appointment of out-of-state administrators, an administrator of a different state than the beneficiaries. I realize that that is going to create a problem where you have got beneficiaries in two or three different states, if their citizenship is different from their decedent. But that problem is dissimilar to the one that is presented here. What do they mean when they say to hinge the diversity on the citizenship of the beneficiaries? What do they mean by the word "hinge?" Does that mean to make it determinative or to make it one of the factors?

Mr. JONES: I would like to argue it and put it before them.

The COURT: Whatever I do, I will be glad to certify it for an mimediate appeal.

Don't put this on the record.

(Discussion off the record.)

The COURT: You know, I want to decide with you. That is my natural inclination. I think it ought to be decided. If motivation is ever an issue, this ought to be the case where you have a proper motivation. But I am just not convinced that the Fourth Circuit leaves me that interpretation. They spend three pages talking about motivation and then go down to one sentence and motivation is not mentioned.

Here is what I am inclined to do: I don't want to go back over it again. Does the defendant contest the statements that Mr. Jones—that Bill has said in regard to the fact that they probably do have a reasonable motive for appointing this administrator?

Mr. WATSON: Yes, sir, we contest that. We contest it, may it please the Court, for the reasons that the depositions will show that there were no assets to be administered on this plaintiff's decedent. The only asset of this estate is the wrongful death action.

The COURT: Jim, where your son has gotten killed and if you were ignorant and you don't know anything about the law, and you don't know what in the world is happening, and you are really old and maybe uneducated, there

may very well be instances in which you want somebody in whom you have confidence to handle things for you, and you may be distraught, and I think what assets the estate has has every bearing on motivation. I can see from what Bill says that there is a proper motive, although incidental, to get it in the federal court, as some cases say.

I am inclined to hold this, and certify the case to an immediate appeal: I don't take anything that I don't have to under advisement. I believe I know more about this right now than I will be when I go back to Charleston and get involved in court and a month later get around to deciding this case.

I am inclined to hold that, from the evidence before me, I could consider that motivation is a factor for the appointment of the administrator and that it was proper, and therefore I would overrule the motion to dismiss; but I am going to do this, so I won't have the case again:

From a reading of *Miller v. Perry,* I have reached the conclusion that motivation is not a factor and that the Court has said that the sole issue hinges entirely on the residency—at least until the Institute's proposals are adopted,—that the sole factor is the residency of the beneficiaries.

Therefore, for that reason, I am going to grant the motion to dismiss in this case, and certify it for immediate appeal. It won't have to come back to me under those circumstances. If the Fourth Circuit said you could consider motivation, if they meant in the *Miller* case that I could consider motivation, I would overrule your motion to dismiss. I am going to take the position that I cannot consider motivation, and I am going to grant the motion to dismiss.

Mr. JONES: I appreciate very much your letting us argue as much as you did.

The COURT: I am very much interested in the question.

I will tell you this, so you will have a starting point: I am going to dictate an oral Order, and you can get a copy of that and do whatever you want to about it.

It appears to the Court, after hearing able arguments from counsel and reviewing the briefs on the issues raised

by the motion to dismiss, and a review, a lengthy review by the Court of the two cases from the Fourth Circuit, *Lester v. McFaddon,* 415 F. (2d) 1101, and *Miller v. Perry,* 456 F. (2d) 63, that the defendant's motion to dismiss should be granted.

In order that the matter can be determined directly on appeal, without returning to this court, this Court holds that it is bound as a matter of law under the case of *Miller v. Perry* to hold that the residence of the beneficiaries of this wrongful death action, that is, Mr. and Mrs. Baker, the mother and father of the deceased, Arthur Lee Baker, Jr., must be attributable to the administrator.

And it appearing that the defendant Hendricks is a citizen and resident of the state of South Carolina, there is no diversity of citizenship, and this court lacks jurisdiction.

The *Miller* case, while going into great detail in discussing motivation and the *Kramer v. Caribbean Mills* case, as this Court reads the case, ends up with this sentence:

> "Until enactment of the statute recommended by the Institute an event much to be hoped, however, we deem ourselves limited to the less satisfactory resolution of the problem we now reach: To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative."

This Court concludes that the Fourth Circuit in the *Miller* case, by that statement, has eliminated completely from consideration by the district courts the question of motivation, and that the sole issue for the present, in circumstances such as here involved in this case, is for the Court to determine the residence or the citizenship of the wrongful death beneficiaries, and, based on their citizenship, determine the citizenship of the administrator—and having attributed the citizenship of the wrongful death beneficiaries to the administrator, then determine whether diversity exists.

This Court is dismissing the action and holding that there is no jurisdiction because it feels as a matter of law

that it has no right to consider motivation, and that it can only consider in this case the citizenship of the wrongful death action beneficiaries.

However, in order, as the Court said originally in the beginning of this oral determination, so that the matter can be clear for the record, if this Court had the authority to consider motivation, and that motivation could be considered by the Court in determining whether or not jurisdiction existed from the record in this case, this Court would hold as a matter of fact that the appointment of the administrator, Mr. Bishop, was not done in order to create diversity so as to get it in the federal court, but was done because Mr. Bishop is the only person in the family of the wrongful death beneficiaries who has the educational background, knowledge, expertise, if that be a good word, and the confidence of the wrongful death beneficiaries.

Therefore, if this Court could base a determination with motivation as a factor, it would hold as a fact that there was nothing improper in the appointment of Mr. Bishop and in using his citizenship as a basis for jurisdiction, and that this court did have jurisdiction, and this Court, if it could consider motivation, would refuse the motion to dismiss. But since the Court has heretofore stated, it feels that it is limited solely to the citizenship of the wrongful death beneficiaries. And the Court does hereby grant the motion to dismiss. And the Court feels that this is an issue of urgency, and is of the opinion that this Order involves a controlling question of law, as to which there is a substantial ground for a difference of opinion, and that an immediate appeal from the Order may materially advance an alternate determination of the litigation, and therefore certifies this case for an immediate appeal to the Court Circuit Court of Appeals under Title 28, Section 1292 of U. S. C. A.

All right, gentlemen.

I certify that the foregoing is a true and correct transcript of my notes.

/s/ DORIS C. APPLEBY,
Official Court Reporter.

C. G. BISHOP, Administrator of the Estate of Arthur Lee Baker, Jr., Deceased, Appellant,

v.

S. HENDRICKS, Jr., Appellee.

No. 73-1725.

United States Court of Appeals, Fourth Circuit.

Submitted Feb. 6, 1974.

Decided April 17, 1974.

Administrator, a citizen of Georgia and a relative by marriage of beneficiaries who were citizens of South Carolina, brought action against a citizen of South Carolina for death which resulted from a motor collision occurring in South Carolina. The United States District Court for the District of South Carolina, at Greenwood, Soloman Blatt, Jr., J., dismissed action for want of jurisdiction, and the administrator appealed. The Court of Appeals, Donald Russell, Circuit Judge, held that the administrator was, so far as suit was concerned, a "straw party," appointed just as a guardian ad litem solely for purpose of providing a nominal plaintiff for maintenance of the action, and that his appointment was manifestly an artificial creation of federal diversity and as such could not support jurisdiction.

Affirmed.

1. Courts ⇐323

In a situation where an out-of-state administrator files a wrongful death action on behalf of resident beneficiaries, involving death of a resident decedent in an accident occurring within the state, want of diversity will be presumed unless the record provides sufficient support for conclusion that the representation of the administrator is not nominal but was based on a valid and substantial reason; but for reason or motive for appointment to give necessary substantiality to his representation that his citizenship will be regarded for diversity it must be more than an expression of sentiment or personal preference or mere kinship with either beneficiaries or decedent; nor can it be established by some self-serving profession of good faith in the appointment. 28 U.S.C.A. § 1359.

2. Courts ⇐311, 316

Reason or motive that will render out-of-state administrator's citizenship important for diversity purposes must be one that harmonizes with thrust and purposes of statute barring federal jurisdiction where any party has been improperly or collusively made or joined to invoke jurisdiction. 28 U.S.C.A. § 1359.

3. Courts ⇐316

Statute barring federal jurisdiction where any party has been improperly or collusively made or joined to invoke jurisdiction was enacted for purpose of denying use of federal courts in suits which do not really and substantially involve a dispute or controversy properly within jurisdiction of federal courts. 28 U.S.C.A. § 1359.

4. Courts ⇐311, 316

Any appointment of an out-of-state administrator, which is nominal and without substance and which, if given effect for jurisdictional purposes, has effect of giving diversity to an action which does not really and substantially involve a dispute or controversy between citizens of different states is violative of purposes of and falls under interdict of statute barring federal jurisdiction where any party has been improperly or collusively made or joined to invoke jurisdiction. 28 U.S.C.A. § 1359.

5. Courts ⇐311

In a diversity wrongful death action brought by an out-of-state administrator, courts should evaluate reasons for the appointment and determine whether the reasons given logically or realistically establish that, as a result, the fiduciary sustains more than a nominal relationship to the litigation. 28 U.S.C.A. § 1359.

6. Courts ⇐311

Fact that beneficiaries are prostrated by grief, or are related to out-of-state administrator or are relying on the administrator for advice or that the out-of-state administrator is a competent businessman will not justify diversity based on administrator's citizenship; confidence in superior business judgment and ties of friendship, even intimate ones, are equally unavailing. 28 U.S.C.A. § 1359.

7. Courts ⇐311

Only if court can conclude that out-of-state administrator has something more than a nominal relationship to the litigation will citizenship of out-of-state administrator sustain diversity, and any reason or motive for the appointment which does not elevate his relationship to the litigation above the level of a nominal party is irrelevant to the issues of diversity. 28 U.S.C.A. § 1359.

8. Courts ⇐311

Where out-of-state administrator who prosecuted wrongful death action had nothing to gain by the suit save a fee for use of his name if successful, and, if the suit was lost, nothing to lose, where prosecution of action was not incidental to any general fiduciary duties of the administrator, where there were no assets in estate other than the suit, where administrator had no knowledge of accident out of which litigation arose, and where administrator had no part in employment of counsel, citizenship of beneficiaries of action, and not that of administrator, was controlling in ascertaining federal diversity jurisdiction, even if administrator was more experienced in business affairs than beneficiaries. 28 U.S.C.A. § 1359.

William T. Jones, Greenwood, S. C., on brief for appellant.

James H. Watson and Carl G. Ferguson, Leatherwood, Walker, Todd & Mann, Greenville, S. C., on brief for appellee.

Before CRAVEN, RUSSELL and FIELD, Circuit Judges.

DONALD RUSSELL, Circuit Judge:

This is an action to recover under the wrongful death statute of South Carolina.[1] It arose out of a motor collision occurring in Newberry County, South Carolina. The deceased was a life-long citizen of South Carolina. The statutory beneficiaries of the action are likewise life-long citizens of South Carolina. The beneficiaries retained counsel to prosecute the wrongful death action on their behalf. After consulting with their counsel, they applied to the local probate court for the appointment of the plaintiff-appellant, a citizen of Georgia and a relative by marriage of the beneficiaries, as administrator in whose name the action might be prosecuted. This action was thereupon commenced as a diversity action in the District Court against the lessee-operator of the other vehicle involved in the accident.[2] The lessee of the other vehicle, who is the appellee on this appeal, was a citizen of South Carolina. He moved to dismiss the action for lack of diversity claiming in support of his motion that when a deceased leaves, as the deceased did in this case, no estate to be administered and the sole reason for the appointment of an administrator is to provide a nominal party plaintiff to institute the action, the benefits of which, if successful, pass directly to the statutory beneficiaries without any general administration, the citizenship of the administrator should be disregarded and the citizenship of the beneficiaries of the action should control in ascertaining federal diversity jurisdiction. The appellant-administrator countered with the contention that such a rule was applicable only when it could

1. Sections 1951-1962, Title 10, Code of Laws of South Carolina (1962).

2. There was a second defendant, whose citizenship was different from that of its co-defendant and that of the administrator. It did not join in the motion to dismiss and is not concerned in the controversy, since unless there was diversity between the plaintiff and the lessee-operator of the tractor-trailer, there could be no basis for diversity jurisdiction.

be found that the sole motive for the appointment of an out-of-state fiduciary was to create federal jurisdiction. The District Court, however, concluded, as did the Court in Nickell v. Westervelt (D.C.Va.1973) 354 F.Supp. 111, 112, and Johnson v. Worley (D.C.Va.1972) 353 F.Supp. 1381, 1382, that Miller v. Perry (4th Cir. 1972) 456 F.2d 63, "held that diversity of citizenship" in such a case as that here "is determined by the citizenship of the beneficiaries rather than by the citizenship of the administrator", and it reached that conclusion despite its remark that in its opinion the "motive" for the appointment of the out-of-state administrator in this case was not the creation of federal jurisdiction. It accordingly dismissed the action for want of jurisdiction. The administrator appeals. We affirm.

The appellant would confine the scope of *Miller* to the peculiar facts of that case; and since the facts in this case are different, he argues *Miller* is without application. *Miller*, however, was not phrased in the narrow terms of its own facts. The language of *Miller* was manifestly intended as a declaration of what one commentator has correctly denominated as "a substantial change in diversity jurisdiction".[3] The Court in that case was focusing generally on the broad, fundamental problem of determining the real party in interest, not in a procedural but in a jurisdictional sense,[4] and in making clear what, in the light of the decision in Kramer v. Caribbean Mills (1969) 394 U.S. 823, 89 S.Ct. 1487, 23 L.Ed.2d 9, was an "improper" or "collusive" joinder under Section 1359, 28 U.S.C. The emphasis "was on a fresh appraisal of an old problem."[5] By its decision, the Court was making a choice between the old, purely mechanical or "ritualistic" rule that an administrator, validly appointed, is always the real party in interest whose citizenship fixes diversity jurisdiction and what, on the other hand, has been aptly described as the more recent "substantive real party in interest test" as determined by the facts of the particular case.[6] The Court recognized that "there was nothing sacred in the customary rule that an administrator's citizenship governs, a principle which serves policies of judicial economy rather than federal-state comity" and concluded as a matter of principle that substance should prevail over mere procedure, that federal courts on jurisdictional issues should "assess the substantive relations between the parties to the controversy"[7] and that they should make "a realistic determination with respect to the presence of diversity."[8] It found authority for such an approach in *Kramer*, which directed, as construed in *Miller*, "that the duties and responsibilities of administrators should be taken into account in federal determinations of the relevancy of the citizenship of such a personal representative to the presence of diversity jurisdiction."[9] It held specifically that when

3. Note, Miller v. Perry: Further Complication in Determining Diversity Jurisdiction, 30 Wash. & Lee L.Rev. 282, 295 (1973).

4. "Real party in interest" as determined for procedural purposes under Rule 17(a) is quite different from the meaning of the term in the jurisdictional sense. Lester v. McFaddon (4th Cir. 1969) 415 F.2d 1101, 1105, n. 10.

5. Note, Federal Courts—Diversity Jurisdiction—When State Law Requires Wrongful Death Action to be Prosecuted by Resident Ancillary Administrator; Citizenship of Beneficiaries is Controlling for Diversity Purposes—Miller v. Perry, 47 N.Y.U.L.Rev. 800, 812.

6. Note, Federal Courts—Appointment of Administrator to Defeat Diversity Jurisdiction, 21 Journal of Public Law 293 (1973).

7. 47 N.Y.U.L.Rev., at p. 814.
See, also, Cerri v. Akron-People's Telephone Co. (D.C.Ohio 1914) 219 F. 285, 292, approved in Newman, Manufacturing Diversity Jurisdiction, 14 Vill.L.Rev. 727, 735.

8. 456 F.2d at p. 67.

9. 456 F.2d at p. 65.
Cf., Note, Federal Jurisdiction—Citizenship of the Beneficiary Controls in Wrongful Death Actions Requiring a Resident Administrator, 51 N.C.L.Rev. 639, 644 (1973):
"* * * the administrator is not *per se* the real party in interest; instead, the

the responsibilities of the administrator are solely to institute the wrongful death action—when he is what one Court has described as "an administrator *ad litem*" and no more [10]—the Court would "hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative." [11]

The result reached in *Miller* had long found advocates among legal scholars.[12] It has received wide approval from the legal commentators.[13] It is in conformity with the rule as stated by Professor Moore in his authoritative text:

> "Where a party sues (or is sued) as a receiver, representative of a class, assignee, subrogee, executor or administrator it is normally his citizenship that is material when jurisdiction is dependent upon the character of the parties. This is true also of the general guardian of an infant, or the curator or committee of a lunatic, when under the law of the state where such fiduciary is appointed he has the status of a real fiduciary. But if the law of the state gives the administrator, guardian, or other representative the status of only a nominal fiduciary then the beneficiary or the ward, not the administrator or guardian, is the real party in interest, and it is the citizenship of the beneficiary or ward, as the case may be, that is determinative." 3A, Moore's Federal Practice, pp. 112–4 (footnotes omitted).

"Such a determination", also, has the virtue that it "insures that federal jurisdiction will be invoked only when necessary to protect the party whose personal interest in the suit might be prejudiced by the presence of local bias", which "has been the historical view for why diversity jurisdiction originated". Note, Federal Jurisdiction—Citizenship of the Beneficiary Controls in Wrongful Death Actions Requiring a Resident Administrator, 51 N.C.L.Rev. 639, 646, and n. 44 (1973).[14] To permit the appoint-

courts have examined his duties and responsibilities before making any determination as to whose citizenship should determine diversity."

See, also, Note, 47 N.Y.U.L.Rev. 800, at 804, where, in summarising the result in *Miller*, the editor said:

"In the view of the Fourth Circuit, *Kramer* mandated 'consideration of [the] duties and responsibilities of a representative party rather than a 'ritualistic' application of the principle that an administrator is the real party in interest for diversity purposes."

10. O'Brien v. Avco Corporation (2d Cir. 1969) 425 F.2d 1030, 1034.

11. 456 F.2d at p. 68.

12. *See* Note, Appointment of Non-Resident Administrators to Create Federal Diversity Jurisdiction, 73 Yale L.J. 873, 883 (1964):

"Thus, if pursuant to a state wrongful death statute or survivors act calling for appointment of an administrator *ad prosequendum*, an administrator is appointed who is not a citizen of the state in which the state is being probated, federal courts should be reluctant to grant federal jurisdiction to that administrator. His duties are temporary and related solely to the suit, for without the cause of action there would be no administrator, and the appointment of a non-resident for such temporary and singularly directed activities gives rise to an inference that the appointment was primarily for purposes of obtaining federal jurisdiction."

13. *See,* Case Note, 47 N.Y.U.L.Rev. 800; Case Note, 51 N.C.L.Rev. 639; Case Note, 21 Journal of Public Law, 293; *contra,* Case Note, 30 Wash. & Lee L.Rev. 282.

14. *See,* Miller v. Perry, *supra,* at p. 67:

"• • • Diversity jurisdiction exists for the protection of the noncitizen who is obliged to sue or to be sued in the state of his adversary. It is for that reason that the device of appointing an out-of-state representative has been condemned."

See, also, White v. Lee Marine Corporation (5th Cir. 1970) 434 F.2d 1096, 1100:

"• • • Allowing this suit [by a non-resident administrator] to be brought in federal court would not advance any of the functions diversity jurisdiction was designed to serve."

See, also, Note, Manufactured Diversity of Citizenship, 2 Texas Tech.L.Rev. 304, 308 (1971) where, commenting on Bass v. Texas Power & Light Company (5th Cir. 1970) 432 F.2d 763, the editor said:

"In such situations, the non-resident administrator cannot plead that his case will be influenced adversely by local prejudice because the jury will know that he repre-

ment of a nominal non-resident fiduciary to create federal diversity jurisdiction would clearly "run counter to the general policy of viewing the federal courts as tribunals of limited jurisdiction whose subject matter jurisdiction principles should be applied with restraint," [15] and, through its artificial creation of diversity, would represent an "improper manufacture of jurisdiction" [16] in obvious violation of the purposes of Section 1359.

[1–7] Even if it be conceded that the rule in *Miller* is normally of general application, the appellant, however, would restrict it to situations where the reason or "motive" assigned for the appointment of the administrator was to create diversity jurisdiction. It may be assumed that if there is a valid reason for the appointment of an out-of-state administrator that gives to his representation greater substantiality than a mere administrator *ad litem*, the citizenship of the administrator may be determinative of diversity. This exception was implicit in *Miller*, which drew a clear distinction between the situation where the administrator was merely an agent to sue "without stake" in the litigation as it were and where he had some substantial interest or stake in the proceedings. It was, also, recognized by implication in Lester v. McFaddon. But it must be remembered that, in a situation where an out-of-state administrator files a wrongful death action on behalf of resident beneficiaries, involving the death of a resident decedent in an accident occurring within the state, want of diversity will be presumed unless the record provides sufficient support for the conclusion that the representation of the administrator is not nominal but was based on a valid and substantial reason.[17] But for the reason or motive for the appointment to give the necessary substantiality to his representation that his citizenship will be regarded for diversity it must be more than an expression of sentiment or personal preference [18] or mere kinship with either the beneficiaries or the decedent.[19] Nor can it be established by some self-serving profession of good faith in the appointment. The reason or motive that will render the out-of-state administrator's citizenship important for diversity purposes must be one that harmonizes with the thrust and purposes of Section 1359 itself.[20] The history of

sents a local beneficiary. Therefore, the basic reason for diversity jurisdiction, local prejudice, will not be present."

To the same effect is Note, 1 St. Mary's L.J. 125, 129 (1969), commenting on McSparran v. Weist (3d Cir. 1968) 402 F.2d 867, 876, cert. denied sub nom. Fritzinger v. Weist, 395 U.S. 903, 89 S.Ct. 1739, 23 L.Ed.2d 217.

15. 6 Wright & Miller, Federal Practice, p. 717.

16. Lester v. McFaddon, *supra*, 415 F.2d at p. 1104.

17. McSparran v. Weist, *supra* (402 F.2d at p. 875).

18. *See* Renner v. Vitcov (D.C.Pa.1972) 339 F.Supp. 1020, 1022, in which the parents-beneficiaries of the action, prostrated by the loss of two sons in one accident, had secured the appointment of a business acquaintance, "a competent businessman", but one with "little experience or knowledge in the field of estate administration." Such considerations were found not substantial enough to give the administrator the status to support diversity.

19. *See* Kane v. Cameron (D.C.Pa.1971) 329 F.Supp. 933, 934–935. Here, a sister of the widow-beneficiary and a woman "capable of sound judgment", was appointed the out-of-state administratrix. The Court dismissed the action, saying:

"* * * Since all the interested parties, except administratrix, have been and are residents of Pennsylvania, and since the defendants reside and the accident occurred in Montgomery County, suit should have been instituted there."

See, also, Butler v. Colfelt (D.C.Pa.1970) 313 F.Supp. 527, aff. (3 Cir.) 439 F.2d 882; Richard v. Dervarics (D.C.Pa.1969) 302 F. Supp. 709.

20. *See* Pangaio v. Palmer Township (D.C.Pa. 1972) 343 F.Supp. 940. The beneficiaries, who spoke Portugese more fluently than they did English, consulted a close and intimate friend, in whom they had confidence and who assisted them in "a great many personal matters". The friend made inquiries into the potentiality of a wrongful death suit and employed the counsel to file suit. Because of their confidence in her, the friend was named

Section 1359 makes clear its purpose. It was enacted as Section 5 of the Act of March 3, 1875, 18 Stat. 470, for the purpose of denying the use of federal courts in suits which did not "really and substantially involve a dispute or controversy properly within the jurisdiction" of the federal courts. This the statute stated in express terms. When this section and the assignee provision of the original Judiciary Act of 1789 were combined in the revision of 1948, this statement of express purpose was omitted but not because it was the intention of the revisers to alter in any way the purpose of the statute;[21] the purpose of the revision and of the omission was to simplify the two provisions in order to eliminate "some of the abstruse distinctions that had grown up * * *". O'Brien v. Avco Corporation, *supra* (425 F.2d at p. 1033). That the purpose of the statute remained the same was emphasized by the Circuit Court opinion in *Kramer*, where "improper or collusive" joinder for jurisdiction was declared to result when it rested on *"colorable assignment or other device without substance"* (Italics added.)[22] And this was the construction adopted and applied in *Miller*. Accordingly, any appointment of an out-of-state administrator, which is nominal and "without substance" and which, if given effect for jurisdictional purposes, has the effect of giving diversity to an action which does not "really and substantially involve a dispute or controversy" between citizens of different states, is violative of the purposes of, and falls under the interdict of, Section 1359.[23] The courts should accordingly evaluate the reasons for the appointment and determine whether the reasons given logically or realistically establish that, as a result, the fiduciary sustains more than a nominal relationship to the litigation.[24] The Courts have often done just that and,

administratrix and filed suit in her name. Finding that such circumstances failed to give a reason that would support diversity based on the friend's citizenship, the Court said:

"* * * Nor does the fact that the decedent's family had confidence in plaintiff justify her appointment in the absence of any special competence in the administration of estates." (p. 942)

21. *See*, McSparran v. Weist, *supra* (402 F.2d at pp. 872, 873):

"* * * In combining these two provisions the reviser intended no alteration in the meaning of § 37 which empowered the district court to dismiss a suit 'at any time * * * [when] such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court * * *.'" Those words, the Court proceeded to add, "give content to its [the statute's] otherwise indefinite and ambiguous words 'improperly' or 'collusively'."

22. Caribbean Mills, Inc. v. Kramer (5th Cir. 1968) 392 F.2d 397, 393, aff. 394 U.S. 823, 89 S.Ct. 1487, 23 L.Ed.2d 9.

23. Contrary to the view of the appellant, this accords with what this Court held in Lester v. McFaddon, *supra*. There, we said (415 F.2d at p. 1106, n. 11):

"It is the lack of a stake in the outcome coupled with the motive to bring into a federal court a local action normally triable only in a state court which is the common thread of the cases holding actions collusively or improperly brought."

See, White v. Lee Marine Corporation, *supra* (434 F.2d at p. 1098) where the Court said:

"* * * This requirement of substantive as well as formal validity of the representative's appointment [to support diversity] has been recognized often in subsequent decisions."

Cf., 6 Wright & Miller, Federal Practice and Procedure, p. 720:

"Recent cases indicate that the permissive attitude toward allowing jurisdiction to be manufactured by assignment or appointment is undergoing a serious re-evaluation. Some federal courts have noted that the anti-collusion statute was enacted in order to preserve the limited character of diversity jurisdiction in the federal courts and have suggested that it should be applied when a party has attempted to create subject matter jurisdiction that would not otherwise exist."

24. A partial list of the factors to be considered in such evaluation is set forth in Groh v. Brooks (3d Cir. 1970) 421 F.2d 589, 595. *See*, for instance, Rogers v. Bates (8th Cir. 1970) 431 F.2d 16, 21:

"* * * We hold the appointment of a representative of a living person, such as a guardian or conservator who undertakes no duties nor obligations to his ward or beneficiary save those incident to the institution

on the basis of their evaluation, have determined whether the citizenship of the administrator is to be given effect. As we have said, the fact that the beneficiaries are prostrated by grief, or are related to the out-of-state administrator, or are relying on the administrator for advice or that the out-of-state administrator is "a competent business man", will not justify diversity based on the administrator's citizenship.[25] Confidence in the superior business judgment and ties of friendship, even intimate ones, are equally unavailing.[26] On the other hand, O'Brien v. Stover (8th Cir. 1971) 443 F.2d 1013, 1015–1016, instances circumstances in which the appointment will control diversity. In that case, the out-of-state administratrix was the daughter of the deceased and "her sole heir". Under these circumstances, the Court said, "The diversity here is bona fide and plaintiff's appointment as administrator was natural and logical under the circumstances. She was the real party in interest. These facts are sufficient to establish diversity jurisdiction."[27] Again, when a general administrator, having assets other than the wrongful death suit to administer and who, incidental to his duties as general administrator, files a wrongful death suit, it has been held, though not uniformly, that his citizenship may be considered for diversity.[28] In summary, only if the Court can conclude that the out-of-state administrator has something more than a nominal relationship to the litigation will the citizenship of an out-of-state administrator sustain diversity, and any reason or motive for the appointment which does not elevate his relationship to the litigation above the level of a nominal party is irrelevant to the issues of diversity.[29]

[8] In this case, the administrator has failed to establish any substantive facts or to assign any valid reasons for his appointment that would give "substance" to his representation or fix his status in the suit as different from nominal. Without any "real [or] substantial interest in the outcome of the litigation", he possesses "no stake in the litigation".[30] He has nothing to gain by the suit save a fee for the use of his name if successful, and, if the suit is lost, nothing to lose.[31] In fact, it would seem that the beneficiaries of the action, if they chose to, could settle the action, with or without consulting him.[32] Nor is the prosecution of the action incidental to

of a lawsuit, falls within the proscription of § 1359 and is insufficient to invoke federal jurisdiction on the basis of diversity of citizenship. In such cases, we look to the citizenship of the ward or beneficiary."

Rogers, it is true, dealt with a conservator —but the same rule was applied to a trustee or administrator in Bartnick v. Reader Company, Inc. (8th Cir. 1973) 487 F.2d 1021.

25. *See* note 19 and 20.

26. Pangaio v. Palmer Township, *supra* (343 F.Supp. at p. 940).

27. To the same effect are Jansen v. Goos (8th Cir. 1962) 302 F.2d 421; County of Todd, Minn. v. Loegering (8th Cir. 1961) 297 F.2d 470, and Davis v. Carabo (D.C.S.C.1970) 50 F.R.D. 468, 469. In Jansen v. Goos, *supra*, 302 F.2d at p. 425, the Court said:

"• • • No question is here raised as to the plaintiff, in her capacity as administratrix, being the real party in interest and the provisions of RRS Nebraska, 1943, § 25-304, confirm this. In any event, the citizenship of all the beneficiaries coincides with that of the plaintiff."

28. Joyce v. Seigel (3d Cir. 1970) 429 F.2d 128; McCoy v. Blakely (8th Cir. 1964) 217 F.2d 227; Lawson v. Morgan (D.C.Pa.1973) 352 F.Supp. 282, *but cf.*, Levenger v. Lehigh Valley Railroad Co. (3d Cir. 1970) 435 F.2d 822.

29. *Cf.*, Kenebrew v. Columbia Land and Timber Co. (5th Cir. 1972) 454 F.2d 1146, 1147:

"• • • Allowing this suit [by an out-of-state administrator *ad litem*] to be prosecuted here would not advance any of the functions that diversity jurisdiction was designed to serve."

30. Dougherty v. Oberg (D.C.Minn.1969) 297 F.Supp. 635, 639.

31. Section 1955, Title 10, Code of Laws of South Carolina (1962) limits the liability for costs on the part of the administrator to assets in his hands and by implication absolves the fiduciary of any personal liability, should the action fail.

32. Aldridge, Admr. v. Watts Mill (1925) 131 S.C. 222, 127 S.E. 213.

any general fiduciary duties of an administrator.[33] There are no assets in the estate other than this suit. The appellant has no knowledge of the accident out of which the litigation arose and can contribute nothing to its prosecution. He actually had no part in the selection or employment of counsel. The employment of counsel occurred before his appointment and under the circumstances, he, like the representative in Lester v. McFaddon, *supra* (415 F.2d at p. 1103) "can hardly be expected to ride herd upon them (i. e., counsel) or exercise any effective supervision of their conduct of the litigation". It is true, he is the nominal plaintiff but this is simply because the statute so commands.[34] But, as the Court emphasized in Bennett v. Ry., Gas & Electric Co. (1914) 97 S.C. 27, 30, 81 S.E. 189, " 'That the act requires the personal representative (administrator or executor) to sue need not trouble us; *the Legislature could as well impose that duty on the sheriff or the coroner.* The proceeds recovered are not for creditors, or the family generally, or for the legatees, but is [are] strictly confined to certain members of the family of the deceased.' " (Italics added. Quoting from Reed v. Ry. Co., 37 S.C. 42, 53, 16 S.E. 289, 291).

The only reason assigned for his appointment and sought to justify diversity on the basis of his citizenship was that he was more experienced in business affairs than the father or mother of the deceased, the beneficiaries of the action. This reason is not persuasive. The beneficiaries, either of whom would have been the natural fiduciary, chose the attorney to prepare the suit and to try it. That was substantially the only function the administrator in a case such as this would perform. The suggestion that the father and mother were without business experience was unimportant since there could be no occasion to use business experience in the very limited, nominal role to be played by the administrator.

In summary, the appellant is, so far as this suit is concerned, a "straw party", appointed just as a guardian *ad litem* solely for the purposes of providing a nominal plaintiff for the maintenance of this action. His appointment is manifestly an artificial creation of federal diversity and as such cannot support jurisdiction. It is, for all practical purposes, similar to the situation in First Nat. Bank of Amherst, Mass. v. Fulcher (D.C.Va.1954) 119 F Supp. 759, p. 763,[35] where the Court, "looking at reality" and determining diversity in the citizen-

33. *Cf.*, 47 N.Y.U.L.Rev. 800, 811:

"Usually, the prosecution of an action [by an administrator] is incidental to the general fiduciary duties of a personal representative; in *Miller*, however, it was the only responsibility of the ancillary administrator. Moreover, in enforcing the claim he did not act in the normal capacity of an administrator as the representative of the decedent estate, but rather as a statutory trustee for the benefit of potential recipients."

34. Paraphrasing the language of the Court in Martineau v. City of St. Paul (8th Cir. 1949) 172 F.2d 777, 780, his position may accurately be analogized to a mere "agent of the Probate Court. * * * appointed for the purpose of enforcing a claim" of the statutory beneficiaries.

See, also, O'Brien v. Avco Corporation, *supra* (425 F.2d at p. 1034):

"* * * The appointment of an administrator *ad litem*, whose sole function is to collect the proceeds of a lawsuit and turn them over to the beneficiary, is far more akin to the 'collection' than the 'actual transfer' line of cases, and it is difficult to justify *Corabi* [Corabi v. Auto Racing, Inc., 3 Cir., 264 F.2d 784] even on the basis of *Black & White Taxicab* [Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681]."

In McSparran v. Weist, *supra* (402 F.2d at p. 874), speaking to a situation where the citizenship of a guardian was involved, the Court said:

"* * * His (the guardian's) appointment may have authorized him to bring suit but his nominal status does not make his citizenship determinative for purposes of diversity."

35. This case was disapproved in Holt v. Middlebrook (4th Cir. 1964) 214 F.2d 187, 189, but it is in accord with the modern rule as enunciated in the decisions already cited, including *Lester* and *Miller* from our own Circuit.

ship of the beneficiaries of the Virginia wrongful death statute rather than that of the administrator, said:

> "* * * The personal representative is nominally the plaintiff solely because the statute says that he must be. Should there be a recovery, no creditor could touch it. No administration is necessary. Any recovery would go to the sons as the jury might direct."

We have not overlooked that the District Court stated that, if the issue were properly before him he would find that the "motive" in the appointment of the appellant as administrator was not improper. He gave no reason for such opinion. As we have indicated, however, the propriety of an administrator's appointment in a case such as this is determined under Section 1359 by whether the administrator has something more than a nominal interest at stake in the litigation.[36] The appellant-administrator manifestly did not have such an interest and the District Court properly dismissed the action on jurisdictional grounds.

Affirmed.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 72-1538

C. G. BISHOP, ADMINISTRATOR OF THE ESTATE OF ARTHUR LEE BAKER, JR., DECEASED, APPELLANT,

versus

FRUEHAUF CORPORATION, A CORPORATION, AND S. HENDRICKS, JR., APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA GREENWOOD DIVISION

WILLIAM T. JONES,
Post Office Box 186,
Greenwood, South Carolina,
Attorney for Appellant.

APPELLANT'S PETITION FOR REHEARING

The Court, Appellant respectfully submits, should rehear this case. The reasons are:

First, the Fourth Circuit Court's decision in this case, if allowed to stand, will create a conflict with the decisions of the Courts of other Circuits that would have to be resolved by the United States Supreme Court.

Second, the Fourth Circuit Court is without any authority deriving from Section 1359, 28 U. S. C. for the diversity jurisdiction test it applied in this case.

I. The decision of the Fourth Circuit Court in this case creates a conflict with the decisions of the Courts of other Circuits.

The decision of the Fourth Circuit Court in this case, if allowed to stand, will create a conflict with the decisions of the Courts of other Circuits. Since *Kramer v. Carribean Mills,* 394 U. S. 832 (1969), and *McSparran v. Weist,* 402 F. (2d) 867 (3 Cir., 1968) the Courts of all other Circuits have held that the question of whether or not an administrator or personal representative in a death action has been appointed **solely** for the purpose or motive of manufacturing diversity of citizenship in contravention of Section 1359, 28 U. S. C. is a **question of fact** to be determined from the evidence appearing.

Now, in the present case, referencing its decision to *Miller v. Perry,* 456 F. (2d) 63 (4 Cir., 1969), the Fourth Circuit Court, in effect, has held that where the citizenship of an administrator or personal representative does not coincide with that of the beneficiaries diversity jurisdiction will not be allowed, regardless of the fact that the appointment may never have been made for the purpose or motive of creating diversity jurisdiction.

The Third Circuit Court in *McSparran* held that "(w)hether in an individual case diversity jurisdiction is 'manufactured' is, of course, a question of fact." *McSparran* further declared that where it is not conceded that the appointment was for that purpose "it will be for the District Court to make a factual determination." This the Fourth Circuit Court avoids doing by arbitrarily holding that "diversity of citizenship . . . is determined by the citizenship of the beneficiaries rather than by the citizenship of the administrator."

Therefore, clearly, the Fourth Circuit Court has injected a test that is totally foreign to the expression of Section 1359, 28 U. S. C. and in conflict with application of Section 1359, 28 U. S. C. to the cases by all other Circuit Courts. *Groh v. Brooks,* 421 F. (2d) 589 (3 Cir. 1970); *Green v. Hale,* 433 F. (2d) 324 (5 Cir., 1970); *O'Brien v. AVCO Corporation,* 425 F. (2d) 1030 (2 Cir., 1969); *Farrell v. Ducharme,* 310 F. Supp. 254 (D. Vt., 1970); *Rogers*

v. Bates, 431 F. (2d) 16 (8 Cir. 1970); *O'Brien v. Stover*, 443 F. (2d) 1013 (8 Cir., 1971).

II. The Fourth Circuit Court is without any authority deriving from Section 1359, 28 U. S. C. for the diversity jurisdiction test it applied in this case.

The authority for divesting an administrator or personal representative of jurisdiction in the Federal Court is found in Section 1359, 28 U. S. C. This is a fact that has been obscured in the entire language of the Fourth Circuit Court's decision in this case; nevertheless, it must be brought to light for the protection of the beneficiaries in this case and any others who may suffer from the tortured construction given the statute by this Court to warrant its conclusion that what the statute means and says is that "diversity of citizenship . . . is determined by the citizenship of the beneficiaries rather than by the citizenship of the administrator." The wording and meaning of the statute is different:

> "Sec. 1359. **Parties collusively joined or made.** A District Court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such Court."

In view of the clear and explicit language of the statute the holding of the Fourth Circuit Court must have the effect, as pointed out earlier, of declaring, as a matter of law, that where the citizenship of an administrator or personal representative does not coincide with that of the beneficiaries diversity jurisdiction will not be allowed, **regardless of the fact that the appointment may never have been made for the purpose or motive of creating diversity jurisdiction.** Under the decision of the Fourth Circuit Court no inquiry is to be made into the question of collusion or impropriety as obviously called for by the statute and notably observed by the Courts of all Circuits that follow the practice of doing so.

In the final analysis the only rational basis on which the Fourth Circuit Court's decision appears to be premised

is a presumption that all foreign administrators or personal representatives are collusively and improperly appointed for the purpose and motive of manufacturing diversity jurisdiction. It may not be conceded that to make such a presumption out of hand comports with the language of the statute or sustains the image of simple justice; it certainly cannot be conceded that it seems right to make such a presumption an irrebutable one absolutely applying to all cases. That does close the door to justice.

For the foregoing reasons Appellant respectfully urges the Fourth Circuit Court to order rehearing of this case.

Respectfuly submitted,

/s/ WILLIAM T. JONES,
Post Office Box 186,
Greenwood, South Carolina,
29646,
Attorney for Appellant.

CERTIFICATE OF SERVICE

It is hereby certified that service of this Petition for Rehearing of the Appellant has been made on opposing counsel by mailing two copies on this 1st day of May, 1974, in an envelope, with postage prepaid, properly addressed as follows:

James H. Watson, Esquire
Carl G. Ferguson, Esquire
Attorneys for Appellee
Leatherwood, Walker, Todd & Mann
217 East Coffee Street
Greenville, South Carolina 29602

/s/ WILLIAM T. JONES,
Attorney for Appellant.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 73-1725

C. G. BISHOP, ADMINISTRATOR OF THE ESTATE OF ARTHUR LEE BAKER, JR., DECEASED, APPELLANT,

versus

FRUEHAUF CORPORATION, A CORPORATION, AND S. HENDRICKS, JR., APPELLEES

Upon consideration of the petition for rehearing filed by the Appellant,

With the concurrence of Judge Craven and Judge Field,

IT IS ADJUDGED AND ORDERED, That the petition for rehearing is denied.

DONALD RUSSELL,
United States District Judge.

A True Copy, Teste:

WILLIAM K. SLATE, II, Clerk.

By: /s/ FAYE CHLOBIE,
Deputy Clerk.

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Supreme Court of the United States

No. 74-118

C. G. BISHOP, ADMINISTRATOR OF THE ESTATE OF ARTHUR LEE BAKER, JR., DECEASED, PETITIONER,

v.

S. HENDRICKS, JR., RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. D. TODD, JR.
LEATHERWOOD, WALKER, TODD & MANN
217 East Coffee St.
Greenville, South Carolina
Counsel for Respondent

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Supreme Court of the United States

No. .....

C. G. BISHOP, Administrator of the
Estate of Arthur Lee Baker, Jr.,
Deceased, Petitioner,

S. HENDRICKS, JR., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Lower Court has not created a conflict between the decisions of the Federal Appellate Courts.

Without question, the Fourth Circuit Court of Appeals did state, as is noted by counsel for Petitioner, that the rule announced in *Miller v Perry*, 456 (F2d) 63 (4th Cir. 1972) and applied herein was manifestly intended as a declaration of a substantial change in diversity jurisdiction. However, the Court attempted, in every instance, to reconcile this approach with the more recent decisions of the other Circuit Courts wherein 28 U.S.C., Sec. 1359 has been construed and interpreted. In fact, the Fourth Circuit Court of Appeals pointed out that the *Miller* rule is merely an application of the rationale employed by the United States Supreme Court in *Kramer v Caribbean Mills*, 394 U.S. 823 (1969), which principle has been applied by all of the Federal Courts confronted with this issue since the date of that decision.

Rather than rejecting motive as a criterion in determining the validity of the appointment of an out-of-state administrator

for diversity jurisdictional purposes, the Lower Court readily acknowledged that "if there is a valid reason for the appointment of . . . [an individual to such an office] that gives to his representation greater substantiality than a mere administrator *ad litem*, the citizenship of the administrator may be determinative of diversity." The Fourth Circuit Court of Appeals thus reaffirmed the validity of the principle that counsel for Appellant contends was repudiated in a manner so as to create a conflict between the decisions of the Federal Appellate Courts, and noted that such recognition was implicit in *Miller*.

It is also respectfully submitted that no decision has been discovered wherein the rule of this case has been advanced before and rejected by any Federal Court post-*Kramer*. Under these circumstances, we find it difficult to agree with counsel for Appellant that the Fourth Circuit Court of Appeals has created a conflict between the decisions of the Federal Appellate Courts. If such a conflict exists it is only latent in nature and would more properly be resolved in a controversy wherein the conflict, if any, is overt and patent. In other words, the Respondent contends that it would be premature to have this issue adjudicated in this proceeding.

2. If this Court deems the Lower Court's ruling to have created a conflict between the decisions of the Federal Appellate Courts the Respondent would urge this Court to ratify the rule of the Fourth Circuit by denying the relief sought by the present Petition and refusing to grant the Writ prayed for therein.

The rule announced in *Miller* and effectuated below is one of the most recent judicial pronouncements in this field of law. Moreover, the Federal Courts have, subsequent to *Kramer*, apparently experienced a certain amount of difficulty in resolving questions raised under 28 U.S.C., Sec. 1359. In many instances, as is noted by the Lower Court, other Federal Courts have decided such issues on the bases of considerations as were utilized herein. Such an approach has now been more definitely enunciated and, it is respectfully submitted, should be sanctioned by this Court by refusing to grant the Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

J. D. TODD, JR.
Counsel for Respondent

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

C. G. BISHOP, ADMINISTRATOR OF THE ESTATE OF ARTHUR LEE BAKER, JR., DECEASED, PETITIONER,

versus

S. HENDRICKS, JR., RESPONDENT

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

---

1. IN REPLY TO RESPONDENT'S FIRST CONTENTION

Two reasons have been urged by petitioner for granting the writ herein, the first of which is:

That the Lower Court created a conflict between the decisions of the Federal Appellate Courts when (a) it asserted that "(t)he language of *Miller* was manifestly intended . . . . as a substantial change in diversity Jurisdiction"; and (b) it had so declared in *Miller* as follows:

> "Until enactment of the statute recommended by the Institute, an event much to be hoped, however, we deem ourselves limited to the less satisfactory resolution of the problem we now reach: To hinge the diversity

determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative."

Now, three counter statements made in Respondent's Brief in Opposition challenge petitioner's contention that to hinge diversity Jurisdiction to the citizenship of the wrongful death action beneficiaries, rather than that of their representative has created a conflict between the decisions of the Federal Appellate Courts. These counter statements are:

"The Lower Court has not created a conflict between the decisions of the Federal Appellate Courts. (Opp. Br., p. 1.)

"It is also respectfully submitted that no decision has been discovered wherein the rule of this case has been advanced before and rejected by any Federal Court post-*Kramer*." (Opp. Br., p. 2.)

"If such a conflict exists it is only latent in nature and would more properly be resolved in a controversy wherein the conflict, if any, is overt and patent." (Opp. Br., p. 2.)

It would be difficult to conceive of a case that raises the issue more obviously and patently than the present case[1] nor one that strikes down a petitioner more completely than does the one herein. But passing over this flaw in Respondent's argument we come to its total repudiation by the decided cases in conflict, e.g. *Bush v. Carpenter Bros.*,

[1] It should be noted that Respondent has at every stage of this case until now acknowledged the patent effect of the new rule declared by the Fourth Circuit. At pages 4 and 5 of Respondent's Brief on appeal to the Fourth Circuit states:

"We do, however, contend that the *Miller* Court, in stating that it had decided 'to hinge the diversity determination to the citizenship of the wrongful death action beneficiaries rather than to their representatives. . . .' mean exactly what it said. That is, in all cases involving questions under 28 U. S. C. Sec. 1359, like the one presented herein, the Fourth Circuit Court of Appeals has decided to apply this standard to determine whether or not 'any party has been improperly or collusively made or joined to invoke the jurisdiction of such Court'."

447 F. (2d) 707 (5th Cir., 1971) wherein the Fifth Circuit Court declared: "It is well established that where the personal representative of the decedent is authorized by statute to bring suit to recover for the death of the decedent, he is the real party in interest within the meaning of that term as used in Rule 17 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. and that his residence will be looked to in determining the existence of Federal diversity jurisdiction in the ordinary case." And in *Majors v. Purnell's Pride, Inc.*, 360 F. Supp. 328 (N. D. Miss., 1973), some two years later the District Court follows the Fifth Circuit Court's rule that the citizenship of the representative and not the beneficiary controls, declaring:

> "Generally it has been the rule in this district, approved by the Fifth Circuit, that the citizenship of the fiduciary rather than that of the beneficiaries is controlling on the question of diversity."

2. IN REPLY TO RESPONDENT'S SECOND CONTENTION

Respondent's counsel urges upon the Court a pragmatic avoidance of the issue and resolution of the problem as follows:

> "2. If this Court deems the Lower Court's ruling to have created a conflict between the decisions of the Federal Appellate Courts the Respondent would urge this Court to ratify the rule of the Fourth Circuit by denying the relief sought by the present Petition and refusing to grant the Writ prayed for therein."

The short answer to this suggestion is that this would only serve to multiply the adverse effects of what the Fourth Circuit Court itself cited as a contra view in footnote 13 of its opinion in *Miller*. This footnote of the Fourth

Circuit Court's opinion cites Case Note, 30 Wash & Lee L. Rev. 282, 294-5 (1973) which states the following:

> "The Fourth Circuit felt that the federal forum should be allowed the Millers to fulfill the dictates of the basic policy underlying diversity jurisdiction and so reached a result that permitted it. However, its reasoning is strained; desire to avoid deciding a constitutional issue should not involve torturing logic to accomplish that end. While the Millers got their federal forum, it is not clear that the Fourth Circuit intended its holding to be limited to *Miller*. Rather, the language of the court indicates that a substantial change in diversity determination was intended. This represents an unsatisfactory result overall; while equity was done, the repercussions will seemingly go far beyond *Miller*, **since the new test for diversity in such actions flies in the face of the Supreme Court and other circuits.**"

But there is even more basic and important reason why the suggestion made by Respondent must be rejected as inappropriate because of a cardinal issue that exists in this case . . . **which issue has been completely avoided in Respondent's Brief**. That issue was summed up at page 4 of the Petitioner's petition, as follows:

> "The focal point of this petition for a writ of certiorari is the Fourth Circuit Court's making a substantial change in diversity citizenship on its own to the extent of **legislating new statute** or **promulgating a new rule** in the important area of jurisdiction, properly for **Congress** or **this Court**.

Petitioner urged this reason for granting the writ under the ground that "The Lower Court Has So Completely Exceeded its Judicial Authority and Function as to Require this Court to Exercise its Power of Supervision to Correct Such Excess."

The statutory character of the Fourth Circuit Court's action is demonstrated, for instance, by a succinct observa-

tion made by the District Court during the course of the evidentiary hearing on Respondent's motion.

> The COURT: "To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative." Now the thing that concerns me: Why do they need a statute?
>
> Mr. FERGUSON: I don't know. That is a good question.
>
> The COURT: If they can hinge it on the citizenship of the beneficiaries, why can't they hinge it on the citizenship of the decedent?

(Petition Appx., p. 29)

The fact that the Fourth Circuit determined to do on its own what has been recognized as requiring a statutory enactment is also borne out by the following colloquy between Court and counsel for Respondent:

> The COURT: You are right about that. If you had one child in four different states, it would be the citizenship of the decedent that would govern, whoever brought the suit. That is how I read it in the beginning.
>
> Mr. FERGUSON: Right.
>
> The COURT: And that is the one that should be adopted.
>
> Mr. FERGUSON: Yes, sir. And I think that in their opinion, **it would take congressional action** to adopt such.

(Petition Appx., p. 26)

Apparently in the Lower Court's view and that of Respondent's counsel some problem stems from what Respondent's counsel stated in its brief to the Fourth Circuit Court:

> "Without stating the facts of *Kramer*, we think it will suffice to say that while the United States Supreme Court indicated a change in approach to the resolution

of questions raised under 28 U. S. C. Sec. 1359, that Court did not lay down any definite rule or promulgate any set standard for courts to apply in determining whether or not an assignment or appointment of a fiduciary falls within the prohibitions of the said statute."

If there is need for a standard to be set, it is for this Court to set. If there is need for legislation it is for Congress to enact. As stated in the Petition this is manifestly a case calling upon this Court for the exercise of its historic, inherent, and quite necessary power of supervision to maintain reasonable and fair uniformity in the administration of justice between the respective Circuit Courts of the federal judiciary; and not allow the Fourth Circuit Court's invasion of the functions of Congress and this Court to stand.

Respectfully submitted,

/s/ WILLIAM T. JONES,
Post Office Box 186,
Greenwood, South Carolina,
29646,
Attorney for Appellant.

C.G. BISHOP, Administrator of the Estate of
Arthur Lee Baker, Jr., Deceased, Petitioner,
versus
S. HENDRICKS, JR., Respondent.

ADDENDA SHEET TO PETITIONER'S REPLY BRIEF
TO RESPONDENT'S BRIEF IN OPPOSTION

[PREFACE NOTE: Petitioner was unable to lodge this portion of the Reply Brief with the printer in time for it to be printed; but believing that it relates to an important consideration respectfully submits it in this form]

QUERY: Does the Lower Court's Double-Expression Language Incorporated in its Opinion in the Case at Bar Sanctify and Sustain its Declaration in *Miller* of a Substantial Change in Diversity Jurisdiction With an Added All-Purpose, All-Cases Application Feature Which Respondent Would Have Defeat the Petition Herein for Writ of Certiorari?

Petitioner, at the outset, apologizes to the Court for the length of the preceeding headnote and what it implies; but we have openly and candidly come to its formulation because of: (a) the expansive language and multiple footnotes in the Lower Court's decision and opinion which has had, upon petitioner's counsel, a profound effect of confusing and obscuring the real meaning of the case, and (b) Respondent's utilization of this double-expression language in opposing the petition for writ of certiorari.

In order to first develop a fair basis for consideration of this question, we call attention to the following:

1. In the Opposition Brief filed with this Court, Respondent's counsel--on the one hand--states that: "Without question, the Fourth Circuit Court of Appeals did state...that the rule announced in Miller v Perry and applied herein was manifestly intended as a substantial change in diversity jurisdiction." (Emphasis supplied)

2. Then--on the other hand--states that: "Rather than rejecting motive as a criterion in determining the validity of the appointment of an out-of-state administrator for diversity jurisdictional purposes, the Lower Court readily acknowledged that 'if there is a valid reason for the appointment...[an individual to such office] that gives to his representative greater substantaility than a mere administrator ad litem, the citizenship of the administrator may be determinative of diversity."

"To hinge the diversity citizenship of the wrongful death action beneficiaries, rather than to that of their representative" was the substantial change intended by the Court. This has been firmly stated by the Court and was clearly demonstrated in the refusal of Petitioner's petition in the Lower Court for Rehearing, wherein the petition pointed out:

> "In view of the clear and explicit language of the statute [28 Sec. 1359] the holding of the Fourth Circuit Court must have the effect, as pointed out earlier, of declaring, as a matter of law, that where the citizenship of

an administrator or personal representative does not coincide with that of the beneficiaries diversity jurisdicition will not be allowed, regardless of the fact that the appointment may never have been made for the purpose or motive of creating diversity jurisdiction. ..... In the final analysis the only rational basis on which the Fourth Circuit Court's decision appears to be premised is a presumption that all forein administrators or personal representatives are collusively and improperly appointed for the purpose and motive of manufacturing diversity jurisdiction."

[Note: Petitioner took this position because the motion to dismiss was brought under the authority of 28 Sec. 1359 and acted upon upon by the District Court and the Fourth Circuit Court under the authority of that specific statute.

In this connection the Lower Court in rendering its decision in the pending case had before it the record from the District Court that presented to it the following statement of the District Court.

"The COURT: ....From a reading of Miller v. Perry, I have reached the conclusion that motivation is not a factor and that the Court has said that the sole issue hinges entirely on the residency--at least until the Institute's proposals are adopted--that the sole factor is the residency of the beneficiaries.

Therefore, for that reason, I am going to grant the motion to dismiss in this case, and certify it for immediate appeal.....If the Fourth Circuit said you could consider motivation, I would overrule your motion to dismiss. I am going to take the position that I cannot consider motivation, and I am going to grant the motion to dismiss." (Pet. Appx. 24)

The self evident fact is that if the Fourth Circuit Court intended

to allow motivation to control or even be considered it would properly have corrected the District Court and returned the case to that Court for further appropriate action. This the Fourth Circuit Court of Appeals did not do.

Finally, it is tellingly obvious that if the real thrust of the Fourth Circuit Court's decision was merely to reaffirm an adherence to application of motivation principle and test there could not have been any claim of the "substantial change in diversity jurisdiction" as claimed and acknowledged by everyone evaluating the action of the Fourth Circuit Court. The basis of that evaluation, wherein it is claimed that the Fourth Circuit Court made a substantial change in diversity jurisdiction, rests entirely upon the following, and nothing more.

The Fourth Circuit Court's rule:

> "Until enactment of the statute recommended by the Institute, an event much to be hoped, however, we deem ourselves limited to the less satisfactory resolution of the problem we now reach: To hinge the diversity determination to the citizenship of the wrongful death action beneficiaries, rather than to that of their representative."

As heretofore pointed out, the Fourth Circuit Court made no response to the distinct view held by the District Court, an avoidance which clearly signalled the Fourth Circuit Court's departure from the principle and test of motivation, conflicting the other Circuit Courts of the Federal Judiciary. For further

amplification of this point, Petitioner urges particular reading of the concluding portion of the Order of the District Court, appearing on page 26 of the Petition Appendix.

Respectfully submitted,

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